United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1301

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA, Appellee, - v - RAFAEL FONTAN , a/k/a "Lefty", Defendant-Appellant	DOCKET NO. 75 Crim. 44

APPELLANT'S BRIEF

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-v- DOCKET NO. 75 Crim. 44

RAFAEL FONTANEZ a/k/a "Lefty",

Defendant-Appellant.

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STATEMENT OF THE CASE

This is an appeal from a judgment of conviction rendered after a jury trial, in the United States District Court, Southern District of New York (Inzer B. Wyatt, J.) on the 28th day of May, 1976.

This jury trial was preceded by two competency hearings, the first finding defendant incompetent to stand trial on November 19, 1975, and the second finding defendant competent to stand trial on April 9 and 12, 1976. The trial itself was conducted on April 12, 13, 14, 15, and 16, 1976, and sentence was duly imposed on May 28, 1976. Notice of Appeal was filed in this Court on June 4, 1976.

STATEMENT OF THE ISSUES

Appellant contends that four issues exist for determination by this Court:

1. The Government failed to prove Count 7 beyond a reasonable doubt, and in the absence of proof of necessary elements, this count should not have been presented to the jury.

2. The Government should not have been permitted to have its witness testify to conclusions and opinions concerning the weapon absent a proper foundation for such testimony.

3. The Government should have been prohibited from offering into evidence a revolver and ammunition absent a sufficient foundation concerning identification and chain of custody.

4. The trial court erred in refusing to allow a qualified clinical psychologist to express an opinion concerning the defendant's criminal responsibility at the time of the alleged crime.

STATEMENT OF FACTS

Prior to the trial, two separate competency hearings were conducted, but as no issues are raised on appeal concerning this, any testimony rendered therein has not been summarized.

GOVERNMENT'S DIRECT CASE

Special Agent CRUZ CORDERO testified that on October 17, 1974, he met RAFAEL FONTANEZ, who asked him whether they were still interested in buying an eighth of a kilogram of heroin for Six Thousand Five Hundred Dollars ($6,500.00) (Minutes of Trial, hereinafter referred to as M.T., pp. 1-3, 5).

The sale was scheduled for the following day (M.T., p. 6). The following day CORDERO spoke with the defendant four separate times on the telephone. FONTANEZ indicated that more heroin was available if they wanted it, and the witness agreed to buy one-quarter of a kilogram for Fourteen Thousand Dollars ($14,000.00) (M.T., pp. 9-12, 14). Special Agent JERRY CASTILLO'S description of the events that occurred on September 17, 1974 for the most part coincided with CORDERO'S testimony, supra, (M.T., pp. 16-18).

The following day CASTILLO drove a government vehicle to the Bronx, where he met the defendant (M.T., pp. 19-20, 43). FONTANEZ appeared to be upset that CASTILLO was late and also upset as he had called CASTILLO twice, and the persons who answered didn't speak Spanish (M.T., pp. 20-21, 44-45). At FONTANEZ'S direction they then drove to a grocery store where defendant made two telephone calls, completing one, to his connection (M.T., pp. 21-22, 45-46). After the second call, he returned and began to drive

CASTILLO'S car in a very erratic manner, going very slowly on the highways, then very fast, on local roads, running stop signs, and red lights, making U-turns, exiting parkways from the express lane, and constantly looking in the rear view mirror. Defendant told CASTILLO that he was looking for "heat" later defined as the police, and sometimes told him that he was lost (M.T. pp. 24-25, 28-30, 48-53).

After driving for approximately forty-five minutes, FONTANEZ parked the car on 168th Street and Colonial Avenue, exited the car, and walked down the street (M.T., pp. 30-31, 48, 53). He returned with another man who remained at the rear of the vehicle; FONTANEZ was carrying a paper bag which he said contained the "stuff". (M.T. pp. 31, 54). CASTILLO opened the car door, at which time defendant pointed a loaded .38 caliber revolver at him, saying that he was going to shoot him (M.T., pp. 31, 55-56, 57).

CASTILLO then observed his surveillance team approach the car and arrest defendant (M.T., pp. 33-35, 40).

JOSEPH P. CURRAN testified that he is a salesman for a pawn shop in Florida, and that he sold the gun, taken from defendant on the night of the arrest, to a Frank Clark in September of 1974. He was unable to identify Mr. Clark in Court; when asked whether he had seen the defendant before, he replied negatively. (App., p. 9).

JOHN A. O'BRIEN, a Special Agent, testified that

he tested the revolver seized from the defendant and that it was operable (App., pp. 17-20).

DEFENDANT'S CASE

ROBERT D. FERRELL, a licensed psychiatrist, testified that he had recently examined the defendant at the Metropolitan Correctional Center (M.T., pp. 125-127).

Additionally, DR. FERRELL had reviewed reports on defendant from the Veteran's Administration Out-Patient Record, Montrose V.A. Hospital In-Patient Records, and three reports from the Government Medical Center at Springfield, Missouri to aid him in diagnosing FONTANEZ'S condition at the time of the alleged crime (M.T., pp. 133-134).

DR. FERRELL explained that he reviewed defendant's social record, his behavior in school, his present behavior, his Army record, and the reports of the various doctors in order to find symptoms of defendant's mental state in October, 1974 (M.T. pp. 138-143).

Based upon his examination of FONTANEZ, and of the various records, he concluded that defendant was suffering from a chronic organic brain syndrome of unknown type on October 18, 1974, (M.T., pp. 145-146). He described this as a brain lesion of unknown origin (M.T., pp. 147-151).

He further stated that it was his opinion that this mental disease was so substantial that defendant lacked capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law (M.T., p. 151).

The doctor maintained this position even when confronted with three psychiatric reports from the Springfield Medical Center dated February 19 and 23, 1976, and March 29, 1976, respectively, which concluded that defendant was competent to stand trial (M.T., pp. 152-165). Two of these reports, completed by a DR. BROOKS, indicated that he could find no significant psychiatric history in FONTANEZ other than an extreme amount of drug and alcohol abuse; they further expressed his opinion that defendant did not and never had suffered from any mental disease or defect (M.T., pp. 152-155, 158-160). The other report, dated February 19, 1976, was based on an examination conducted by a team of psychiatrists at the same hospital, who concluded, after examining defendant and his prior medical records, that defendant was competent to stand trial (M.T., pp. 155-156).

DR. FERRELL testified that based upon the data he possessed, he disagreed with the conclusions arrived at in those reports. He said he could not agree with the data or material relied upon in those reports as such was unavailable to him (M.T. pp. 155, 157-163).

Specifically referring to FONTANEZ'S conduct at the time of the alleged crime, FERRELL testified that he believed that defendant knew he had a gun, and he was capable of knowing it was loaded, and perhaps appreciated that if

such gun were fired, it would kill or injure another (M.T., pp. 167-168). He believed that defendant refrained from pulling the trigger (M.T., pp. 168-169). DR. FERRELL further stated, in response to questions regarding FONTANEZ'S awareness of the police, that he did not believe defendant was aware of the consequences of his acts (M.T., p. 170).

NAOMI GOLDSTEIN, a licensed psychiatrist employed by the Matropolitan Correctional Center, testified that she first examined FONTANEZ on October 22, 1974, (M.T., pp. 184-186) at which time she made a tentative diagnosis of possible chronic schizophrenia (M.T. p.p. 186-189). DR. GOLDSTEIN saw FONTANEZ continually after that while he was in the Correctional Center (M.T., p. 195). She found his mental picture to be quite persistent noting considerable fluctuation in his mental state, but finding him to be chronically tense, depressed, anxious and on occasion complaining of audatory and visual hallucinations (M.T., p. 194).

She additionally reviewed other psychiatric diagnoses of defendant which assisted her in rendering a diagnosis. Specifically, she reviewed a report dated May, 1974, by a DR. MORRIS FRIEDMAN, Staff Psychiatrist at the V.A. Hospital, and another dated February 18, 1975 by DR. MANFRED BRAUN, also from the V.A. Hospital; the former report presenting a diagnosis of schizophrenia paranoid

type and the latter one of schizo-affective schizophrenia (M.T., pp. 201 - 209). DR. GOLDSTEIN also reviewed the reports filed from Springfield Medical Center, and she determined that these reports and multiple diagnoses of defendant's initial stay at Springfield were not inconsistent with her opinion (M.T., pp. 209-214).

GOLDSTEIN believed that there was ample evidence that FONTANEZ has been chronically mentally ill for a number of years and there was a good possibility that he was mentally ill on October 17 or 18, 1974 (M. T. pp. 193, 214, 215).

The doctor stated that the record of CASTILLO'S testimony which she read quickly indicated that a fairly intricate set of events had occurred, and though defendant may have been mentally ill, he appeared to have some awareness of what he was going (M.T., pp. 216-217). On the other hand, she did not believe that this record demonstrated defendant's ability to conform his conduct to the law (M.T., p. 217). It was pointed out that at particular moments, FONTANEZ did respond appropriately to the circumstances of October 18, but DR. GOLDSTEIN was not sure that he could conform his behavior at all times due to his mental illness; she explained that this was not inconsistent with a diagnosis of mental illness, but instead, this was one of the symptoms of schizophrenia (M. T., pp. 218 and 219);

233-236).

Lastly, DR. GOLDSTEIN felt that it was possible that FONTANEZ was unable, due to a mental disease or defect, to conform his conduct at times on October 17 and 18 to the requirements of law; she did not believe that she was in a position to specify exactly what times on these dates he was unable to conform his conduct (M.T., p. 236).

LOIS BRIGGS, a consultant psychometrist and consultant psychologist, testified that she had been previously employed by the Springfield Medical Center for two and one-half years (M.T., pp. 244-245, 264). While at Springfield, she was assigned to the forensic unit, which examined patients to determine whether they were competent to stand trial.

She interviewed FONTANEZ at Springfield, initially on April 4, 1975, and later on August 19, 1975, (App., pp. 24, 33). During these interviews, she administered the following tests to defendant: The Full Range Picture, Vocabulary Test, an I.Q. test for non-readers, the Rotter and Incomplete Sentence Test, a personality test, the Gorham Proverb Test, a test of the organization of thinking ability, the House-Tree-Person Test, an eye-hand coordination test, and the Bender-Visual Motor Gestalt test, which is a test for neurological impairment. (App.,

24-35).

In evaluating the results of these tests, she determined that defendant had an I.Q. of less than 70 with a mental age of 11 and one-half years, which constituted mental retardation (App. pp. 25-26), his thinking was concrete with an inability to reason abstractly (App. p. 28), he was confused, depressed, had feelings of inadequacy, and neurological difficulties, perhaps a neurological impairment. (App., p. 30).

Based on the above, it was BRIGGS' opinion that on October 17 or 18, FONTANEZ was suffering from chronic schizophrenia and also neurological impairment (App. pp. 36-37). When the witness attempted to define the neurological impairment and further diagnose or express her opinion as to defendant's mental condition, the Court disallowed such, stating that she was not qualified to express these opinions (App., pp. 37-40).

GOVERNMENT'S REBUTTAL

EUFEMIO VARGAS, a previously convicted felon who was cooperating with the agents of the Drug Enforcement Administration (M.T., pp. 280-285), testified that he had known defendant for approximately three years (M.T., p. 269). In October, 1974, he spoke with FONTANEZ in person, and observed that defendant wasn't himself, he was very high, much too tense, nervous, a total wreck, and "looked like he was going out of his mind" (M.T., pp. 273-275).

On the following Monday, he received a telephone call from FONTANEZ, who said that he had been "busted" with a friend in the Bronx, making a sale of coffee that was supposed to be dope to a guy in a car, and that he was only scaring the guy and didn't mean to hurt anyone, or "blow him away" (M.T., pp. 276-280). FONTANEZ said he was really scared, and asked VARGAS to see whether Special Agent GRENNAN could assist him if he cooperated (M.T., p. 280).

JAMES GRENNAN, an agent of the Drug Enforcement Administration, testified that he received five or six telephone calls from FONTANEZ after he had been arrested in 1974 (M.T., pp. 287-288). He finally went to see him at the jail, and advised defendant that he could not get him released but that defendant would have to work inside the jail. During their conversation, FONTANEZ told him that he wasn't going

to shoot anyone, and then he advised GRENNAN that the other guy was going to shoot him (M.T., pp. 290-291).

GEORGE HAMILTON WILKIE, a qualified psychiatrist, testified that in addition to talking to defendant he had reviewed the trial testimony of April 12 and the defendant's records from both the V.A. Hospital and the Medical Center (M.T., pp. 304-305). Based upon the above, he stated the opinion that defendant was not suffering from a mental disease which rendered him incapable of appreciating the wronfgulness of his conduct, or the ability to conform his conduct to the requirements of law (M.T., p. 305).

DR. WILKIE said he was unable to find any data which would indicate that this man was in a psychotic state, unable to tell right from wrong (M.T., p.306). The doctor did, however, agree that the defendant suffered from a state of chronic schizophrenia (M.T., p. 309).

WILKIE testified that FONTANEZ'S behavior on the day of the alleged crime was not symptomatic of a psychotic man, but rather indicated a use of bad judgment (M.T., pp. 310-314).

In describing a psychotic episode, the doctor contended that such a mental state could be in remission for a short period of time, but that he had no evidence that such occurred in the instant case (M.T., pp. 320-321, 324). He conceded that a similarly qualified psychiatrist

who observed defendant closer in time to the crime would have a better ability to analyze FONTANEZ'S state of mind at that time (M.T., pp. 307-308).

PIERRE DWYER, a licensed psychiatrist practicing at the Springfield Medical Center, testified that he examined FONTANEZ in June of 1975. He also reviewed the reports from the V.A. Hospital, the Army, and from other staff members from his hospital, and he had read the trial transcript of April 12 (M.T., pp. 330-331). Based upon this Court testimony, it was his opinion that defendant was able to appreciate the wrongfulness of his conduct and to conform to the requirements of the law on October 17 and 18, 1974 (M.T., pp. 331-332).

DR. DWYER found defendant able to plan his behavior, use the telephone, speak coherently, set up appointments and interact rationally with others (M.T., p. 332). Defendant did not show any symptoms of mental illness at that time (M.T., p. 333).

When he saw defendant, FONTANEZ was suffering from undifferentiated schizophrenia characterized by extreme tension, agitation, restlessness and hallucinations (M.T., pp. 333-335). He stated that this disease lasted approximately six weeks (M.T., p. 335). Defendant's history, reviewed by DWYER, indicated that at times he suffered from chronic schizophrenia between 1968 and 1975 (M.T., p. 347).

ARGUMENT

POINT ONE

THE GOVERNMENT FAILED TO PROVE COUNT SEVEN OF THE INDICTMENT BEYOND A REASONABLE DOUBT.

The Government's duty under Count 7 of the indictment was to prove beyond a reasonable doubt that defendant, who at that time, knew he was under indictment for a felony, unlawfully received a firearm and ammunition that had been shipped and transported in interstate commerce (See, Court's Instructions to Jury, pp. 448-465). Appellant submits that this burden of proof was not satisfied by the evidence in the case.

Count 7 refers to a violation of 18 U.S.C. Section 922(h) (18 U.S.C.S. Section 922 (h)). The scope of this section has been the subject of considerable variance of opinion as evidenced by the opinions contained in United States v. Ruffin, 490 F2d 557 (C.A.Mos., 1974), and United States v. Petrucci, 486 F2d 329 (C.A.Cal. 1973), cert. den. 94 S.Ct. 1937, 416 U.S.937, 40 L.Ed.2d 287. Hopefully, this issue was finally laid to rest in the recent decision rendered in Barrett v. United States, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976), which concluded that Section 922(h) covers the intrastate receipt of a firearm that previously had moved in interstate commerce.

The Barrett case clearly defines what elements must be established by the Government to prove a violation of this section. First, the individual must, inter alia, be under indictment, he must receive an operable firearm, and such gun must have been shipped or transported in interstate commerce.

In the instant case, it was stipulated that defendant was under indictment at the time of the alleged crime; it was also stipulated that he knew he was under indictment at the time (Court's Instruction to Jury, pp. 464-466). It is uncontested that defendant intentionally received the firearm as it was found in his possession at the time of his arrest (transcript, p. 113-114), and it is readily apparent that the firearm was operable (transcript, pp. 109-112).

The only contested issue presented here is whether the weapon "...has been shipped or transported in interstate or foreign commerce". (18 U.S.C. Section 922(h)). Apparently, the Government either overlooked this requirement or had determined that it was self-explanatory as it concluded in summation:

> "Also, we submit there is no doubt about the other count in the indictment, and that is possession of a deadly weapon while under indictment. So I am not going to go through that in great detail with you."

(Government's Summation, p. 395). No further mention of this charge was made by the Government either in summation or rebuttal summation.

While there is a conspicuous absence of any reference to "interstate commerce" in the Government's summation, there was no such oversight in the Court's charge. Indeed, it charged that as an essential element, the Government must prove:

> "Fifth, that the firearm which the defendant received had previously been shipped or transported in interstate commerce; that is, had traveled between two or more states of the United States.
>
> "...The Government has met its burden of showing interstate commerce if the firearm allegedly received by the defendant Fontanez previously traveled between two states of the United States."

(Court's Instruction to Jury, pp. 466-467) (Emphasis added).

In its direct case, the Government attempted to prove Count 7 by relying on the testimony of JOSEPH CURRAN, a salesman clerk at a pawn shop in Florida (App., p. 6). He only testified that he had sold the weapon in question to a Mr. Frank Clark, on September 4, 1974, in Daytona, Florida, and that this person was not present in Court; he also did not recognize defendant herein (App., pp. 8,9).

After reading CURRAN'S testimony, it is extremely difficult to see how the Government planned to prove that

this weapon had previously been shipped in interstate commerce prior to receipt by defendant. No direct evidence whatsoever was introduced concerning this matter, nor was there sufficient circumstantial evidence adduced to conclude that this weapon had been shipped in interstate commerce. Indeed, the only evidence present involved a totally intrastate transaction; for that matter, SPECIAL AGENT O'BRIEN later testified that the R & G Company was located in Miami, Florida, the same state of the pawnshop (App. p. 20-21).

Surely, more evidence must be presented aside from defendant's mere possession in New York State to establish this essential element beyond a reasonable doubt.

Comparing the present set of facts with those in Barrett, supra, clearly shows the insufficiency of the Government's case. In Barrett, it was shown that the gun received by a convicted felon in Kentucky had been manufactured in Massachusetts, shipped in interstate commerce to a distributor in North Carolina, and then was received by the dealer in Kentucky (46 L.Ed.2d 450, 453). This fact unquestionably shows a definite nexus between the weapon itself and interstate commerce.

In the instant case, the record is fatally void of any such connection between the weapon and interstate commerce. There is no reference to the manufacturing state,

the shipping state, the warehouse state, or any other state through which this weapon may or may not have been transported prior to its receipt by defendant. Nor is there any indication directing one's attention to where, in fact, the defendant actually received this weapon.

At the close of the Government's case, and again, after the entire case, defense counsel requested that this charge, inter alia, be dismissed as the Government failed to establish a prima facie case (Defendant's Motions, pp. 115-116, 437). With regard to the aforementioned deficiencies in their case, Appellant submits that the lower Court erred in denying these motions.

POINT TWO

THE PAWNSHOP CLERK'S TESTIMONY SHOULD HAVE BEEN EXCLUDED AS IT WAS INADMISSIBLE AND HIGHLY PREJUDICIAL

In the preceding argument, this Court's attention was directed to the testimony of the salesman clerk of a Florida pawnshop. The Government obviously relied upon this witness to present sufficient evidence to prove Count 7 of the indictment. (See, Court's Instruction to Jury, p. 467). Assuming arguendo that this testimony was critical to that portion of the case, appellant submits that much of the testimony received was inadmissible and that the lower court's failure to exclude it was an abuse of discretion affecting the substantial rights of appellant, denying him a fair trial.

The error considered here is two-pronged. First, the salesclerk identified the weapon seized from defendant as the same one he had previously sold to a Frank Clark on September 4, 1974, in Florida (App. p. 6). On direct examination, he compared the serial numbers of this gun with the serial numbers on the sales records which were the same, except for the first letters of each; the gun's serial number starting with the letter "Q", and the other starting with the letter "O".

Explaining away this discrepancy, he testified, over

objection, that he had "obviously" just copied down the wrong letter, or had misread it (App., pp. 9-10).

It is submitted that any such discrepancy is extremely important in a case involving possession of a weapon involved in interstate commerce and that the jury has sole province in considering or resolving any such issue. Here, instead, the jury's function was usurped, and the lay witness was permitted to state an opinion and conclusion which were neither rationally based upon his perception as compared to that of the jurors, nor was his conclusion helpful to a clear understanding of his testimony. Prejudicial error was committed here, and the witness' conclusion should have been excluded, pursuant to the Federal Rules of Evidence, 28 U.S.C. Rules 602, 701 (28 U.S.C.A. Rules 602, 701).

The second error compounded the first, and irrevocably prejudiced defendant. The salesclerk was asked, in light of this serial number discrepancy, how he knew he "obviously" miscopied the letter. Over continuous objection, he was allowed to testify that the established procedure of the R & G Company (apparently the gun's manufacturer) never prefixed a serial number with the letter "O" on any of its products (App., pp. 10, 11). There is no evidence on the record showing any knowledge, skill, experience, or training this witness might have had with this company, aside from the fact that the pawnshop carried its

products. It is also devoid of any foundation showing that the witness possessed any special knowledge, skill, experience, training or education with regard to this specific kind of weapon, or for that matter, any weapon at all.

It is clear that a witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter..." (Fed. Rules of Evidence, 28 U.S.C.A. Rule 602). Here, there was no foundation laid to show personal knowledge, and the testimony should have been excluded.

Additionally, testimony about the "established procedure" of the firearm company is either so technical or requires such specialized knowledge that it falls within the purview of the evidenciary rules regarding expert witnesses. (Fed. Rules of Evidence, 28 U.S.C.A. Rule 702). In the present case, there was no attempt made to qualify the salesclerk of the pawnshop as an expert, and, consequently, his testimony must be excluded.

POINT THREE

THE EVIDENCE ENVELOPE, REVOLVER, AND AMMUNITION SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE, AS ITS CHAIN OF CUSTODY WAS INSUFFICIENTLY ESTABLISHED.

It is well established that before a matter is received in evidence, it must be properly authenticated or identified (Federal Rules of Evidence, 28 U.S.C., Rule 901 (a.). In the present case, the required identification and authentication was proper and completely sufficient proof of the chain of custody of the revolver and ammunition from the time of the arrest to the day of trial (See, United States v. McFadden, 458 F.2d 440 (C.A., Mich., 1972), cert.den. 92 S. Ct. 973, 410 U.S. 911, 35 L.Ed.2d 274). It is submitted by appellant that no sufficient foundation was presented, consequently making this evidence inadmissible.

The relevant testimony on this issue came from Special Agents JOHN COSTANZO, JERRY CASTILLO and JOHN O'BRIEN. (Transcript, pp. 37-30, 65 App., p. 17). COSTANZO testified that he received a loaded revolver on October 18, 1974, when it was given to him by another agent; then he returned to his office and placed it into an evidence envelope, sealed the envelope, initialed it, placed it into the vault; and, subsequently, the envelope was removed on October 21, 1974, and given to Special Agent O'BRIEN for testing (Transcript,

pp. 78-79). Agent CASTILLO verified this course of action (Transcript, p. 37). On voir dire by defense counsel, COSTANZO was unable to explain why the evidence envelope was unsealed, and also admitted that he had no independent method of identifying the bullets contained in the envelope (App., pp. 14-15). Previously, it was admitted by the Government that this evidence envelope had arrived at the Courthouse in an opened condition (Transcript, p. 38). Defense counsel then objected to the admissibility of these items into evidence, but this objection was overruled by the trial court (App., p. 16).

Later in the trial, Special Agent O'BRIEN was shown the revolver and he said he recognized it by his initials, which he placed on it on October 21, 1974 (App., p. 18). He also identified the bullets by the way they were placed in the evidence bag which was affixed to the evidence tag when he received it (App., p. 19). His identifying marks, however, were not placed on the revolver until more than a month after the weapon was originally seized.

Many factors usually relied upon to establish chain of custody are notably absent in this trial. (See, United States v. Jones, 491 F2d 526 (C.A. Iowa, 1973), cert.den. 94 S.Ct. 3174, 417 U.S. 970, 41 L.Ed. 2d 1141; United States v. Christopher, 488 F.2d 849, (C.A. Ariz.,

1973); United States v. Robinson, 367 F. Supp. 1108 (D.C. Tenn., 1973). The record is devoid of any testimony which would establish that any identifying marks or tags were placed on either the revolver or the ammunition from the date of the arrest to the date it was transferred to Agent O'BRIEN. Nor is there any evidence showing what happened to these items after Agent O'BRIEN test-fired the gun. Similarly, there is no testimony showing what the standard police procedure is regarding the protection of evidence, nor is there any testimony that evidence in question was not tampered with (See, United States v. Christopher, 488 F. 2d 849, (C.A. Ariz., 1973).

Due to the contested and unexplained condition of the evidence envelope at the time it arrived at the trial, there should be no question that it was vital that the Government show by clear, unequivocal evidence that the chain of custody was unbroken (See, United States v. Parker, 491 F. 2d 517 (C.A. Iowa, 1973)). However, in the instant case, such clear evidence is lacking.

POINT FOUR

THE LOWER COURT COMMITTED REVERSABLE ERROR IN REFUSING TO ALLOW THE PSYCHOLOGIST TO EXPRESS HER OPINION AS TO DEFENDANT'S SANITY.

In the instant case, LOIS BRIGGS, a consultant psychometrist and a psychologist, was not allowed by the Court to express an opinion as to deferdant's mental disease or defect on or about October 18, 1974 (App., pp. 38, 40). Specifically, the lower Court stated:

> "...I don't believe that she can express an opinion as to a mental disease or defect. I don't think she is qualified to do that. She is obviously very able in her field, and I have permitted her to tell what she did and the results of what she did, and on the basis of what qualified psychiatrists have testified, you can make arguments to the jury based on that..."
>
> (App., p. 39) (Emphasis added).

It is obvious that it is within the discretion of the trial court to determine whether witnesses possess sufficient qualifications as an expert to enable them to testify as to their opinions. United States v. Trice, 476 F.2d 89, 91 (9th Cir., cert.den.) sub nom. Clayton v. United States, 414 U.S. 843, 94 S. Ct. 103, 38 L.Ed. 2d 81 (1973). Appellant submits that in this case, the trial judge clearly abused his discretion and apparently was under the incorrect impression that while psychiatrists are

qualified to give expert opinions on this subject, psychologists are not.

The present status of the law regarding the ability of psychologists to state expert opinions as to sanity is very well defined in United States v. Tesfa, 404 F.Supp. 1259, 1273 (D.C.Pa., 1975) (See also the co-defendant's case, United States v. Green, 373 F.Supp. 149 (D.C. Pa., 1973), aff. 505 F.2d 731, cert.den. 420 U.S. 978) where the Court held:

> "...Clearly, the testimony of psychologists, as well as psychiatrists is admissible on the question of insanity. United States v. Browner, 153 U.S.App.D.C. 1, 471 F.2d 969, 994 (en banc, 1972); Jenkins v. United States, 113 U.S. App.D.C. 300, 307 F.2d 637, 643 (en banc, 1962).
>
> As Judge Bazelon pointed out in Jenkins:
>
> "The critical factor in respect to admissibility is the actual experience of the witness and the probable probative value of his opinion.
>
> * * *
>
> "The determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge. It does not depend upon his claim to the title 'psychologist' ".

Miss Briggs' credentials unquestionably qualify her as an expert witness. She has a Bachelor of Arts degree in psychology and a Master of Arts degree in clinical

psychology from the University of Tulsa. She has worked as a school psychologist, a diagnostician, and a counselor in the County Guidance Clinic in Oklahoma. She taught psychology for three years in the Southwest Missouri State University in Springfield. Of direct relevance to this case, BRIGGS was employed as a consultant psychometrist, a specialist in psychological testing, and a consultant psychologist for two and one-half years at the Springfield Medical Center, the very hospital where defendant was hospitalized prior to trial (App., pp. 22-23).

Referring to her practical experience, she was assigned to the forensic unit of the Springfield Medical Center, which examined patients to determine whether they were competent to stand trial, and in some cases, to determine whether they were legally responsible at the time of their crime. (App., p. 24). BRIGGS' specific assignment was to interview clients, administer psychological testing, evaluate the results of such testing, and form an opinion as to his/her mental state (Id.). She performed this duty, giving about 12 to 15 tests per week for more than two and one-half years (App., p. 33).

This case, while perhaps not a classical battle between experts", nevertheless revolved around the issue of defendant's sanity; indeed, this was the sole defense

brought forward by defendant. In this light, BRIGGS' opinion could very possibly have influenced the jury; her personal contact with defendant for three days per week during his stay at Springfield Medical Center, coupled with her observations at two separate rounds of psychological testing definitely would have presented a personal insight to the jury. (See, App., pp. 24, 33, 44).

It is impossible to guess the jury's verdict had LOIS BRIGGS been permitted to testify. There is every reason to believe, however, that MISS BRIGGS, a Government employee at the time of her observations of the defendant, and not a "hired gun", would have had an extremely telling effect on the jury, particularly in light of the fact that she of all the psychiatric witnesses, had by far the longest and most thorough opportunity to observe the defendant. In addition, if the jury's failure to convict on the conspiracy count was based upon the psychiatric defense, (again, the only one presented) the testimony of MISS BRIGGS may well have tipped the scale so that the jury might have determined, in addition to lacking the mental capacity to harbor the requisite intent to be guilty of conspiracy, FONTANEZ also lacked the mental capacity to harbor the more limited type of intent required for the acts of which the jury convicted him.

CONCLUSION

For the above stated reasons, the entire conviction should be reversed or set aside and remanded for a new trial, or, in the alternative, the conviction of Count Seven of the Indictment should be set aside.

Respectfully submitted,

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